HIGH COURT OF DELHI : NEW DELHI

Date of decision: 20th September, 2007

W.P (C) No.2832/2007 & CMs No.5292-93/2007

Union of India & Anr. .....Petitioner
! Through: Mr.A.K. Bhardwaj, Advocate

versus

$ Shri A.K. Chohdda & Ors. ..... Respondent
^ Through: Mr.Sandeep Sethi, Sr.Adv. with Mr. A.K. Behera & Lakshay Sawhney,Advs. for Respondent No.1.
Mr. Arun Bharwaj & Mr. B.S. Mathur, Advs. for respondent No.2

***CORAM:**

HON"BLE MR.JUSTICE A.K.SIKRI
HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?

2. To be referred to Reporter or not?

3. Whether the judgment should be reported in the Digest?

A.K.SIKRI, J (Oral)
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1. The first question that arises for consideration is as to whether DPC was right in following the procedure contained in Office Memorandum dated 8.2.2002. For this purpose we will have to take

into consideration as to what was the rule of promotion prescribed as per Notification dated 9.9.2004, namely, Indian Supply Service (Group-A) Rules 1990. There is an amendment to these Rules in the year 2004 vide Notification dated 21.6.2004. However the period with which we are concerned relates prior to 21.6.2004 and, therefore, it cannot be disputed that the promotion to the post of Senior Administrative Grade was regulated by the unamended rules (hereinafter referred to as 1994 Rules) which prevailed prior to the notification dated 21.6.2004. Rule 7 of the 1994 Rules is relevant for our purpose. Omitting that portion of this Rule with which we are not concerned, this Rule 7 reads as under:

> "7. Future maintenance of the Service:
> .....
> (4) All selection of officers for promotion shall be made by selection on merit except in the following cases, namely:
> (a) Promotion of officers from the posts in the Junior Time Scale to the posts in the Senior Time Scale of the Service shall be in the order of seniority subject to the reaction of the unfit; and
> (b) Grant of Selection Grade (Non Functional) in the Junior Administrative Grade of the Service shall be made in the order of their seniority based on their suitability taking into account the overall performance, experience and other related matters in accordance with the guidelines issued by the Government from time to time.
> (5) Selection of officer in each case under item (b) of sub-rule (2) and sub-rule(3) shall be on the recommendations of the Departmental Promotion Committee constituted in accordance with the Schedule III.
> (6) If any officer appointed to any grade in the

> Service is considered for the purpose of promotion to the higher grade, all persons senior to him in the grade shall also be considered notwithstanding that they do not fulfill the prescribed eligibility service if the shortfall is not more than one year and provided they have successfully completed their probation period, if prescribed."

Subrule (4) of Rule 7, as is clear from its reading, provides for promotion by "selection on merit".

2. The OM dated 8.2.2002 was issued by the Ministry of Personnel, Public Grievances and Pension, Department of Personnel and Training, in supersession of earlier OM dated 8.3.1989. As per this OM the DPC is to determine merits of the candidates, who are assessed for promotion with reference to the prescribed bench mark and accordingly Grade the officers 'fit' or 'unfit' only. However, the circumstances in which such an exercise is to be undertaken is prescribed in para-3.1 which deals with mode of promotion, and is followed by the prescription of aforesaid bench mark which is contained in para-32. For our benefit we reproduce both these subparas of paragraph 3:

> "3.1 Mode of Promotion
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> In the case of 'selection' (merit) promotion, the hitherto existing distinction in the nomenclature ('selection by merit' and 'selection-cum-seniority') is dispensed with and the mode of promotion in all such cases is rechristened as 'selection' only. The element of selectivity (higher or lower) shall be determined with reference to the relevant bench-mark ("Very Good" or "Good") prescribed for promotion.
>
> 3.2"Bench-mark for promotion
>
> The DPC shall determine the merit of those

being assessed for promotion with reference to the prescribed bench-mark and accordingly grade the officers as 'fit' or 'unfit' only. Only those who are graded 'fit' (i.e. who meet the prescribed bench-mark by the DPC shall be included and arranged in the select panel in order to their inter se seniority in the feeder grade. Those officers who are graded 'unfit' (in terms of the prescribed bench-mark) by the DPC shall not be included in the select panel. Thus, there shall be no supersession in promotion among those who are graded 'fit' (in terms of the prescribed bench-mark) by the DPC."

3. The reading of the entire OM along with aforementioned portion of this OM would make it clear that such a procedure was to be followed in case of "selection (merit) promotion". The OM itself makes distinction between the cases where the promotion is by "selection" and where the promotion is on the basis of "selection by merit". It is thus obvious that this OM was issued giving instructions to the departmental promotion committees to adopt the procedure of determining the merit of candidates on the basis of bench mark and grading them as `fit' or `unfit' in those cases where the promotion is by `selection' and not where it is on the basis of `selection by merit'. Para 6 of this OM in fact is a clincher, inasmuch as, per that para Ministries/departments are advised to amend the service rules/recruitment rules so as to appropriately incorporate the mode of promotion as 'selection' in place of 'selection by merit'.

4. In our view, in the present case this OM was not applicable, inasmuch as, subrule 4 of Rule 7 prescribed the mode of promotion to be 'selection on merit' and not `selection'. The Rule was

amended only in June, 2004 as aforesaid and naturally such a Rule would be prospective in nature. It is obvious that in these circumstances OM dated 8.2.2002 was not to be applied while considering the cases of promotion to the senior administrative grade in view of rule position prevailing during the the relevant period.

5. In fact, even the department understood the implication of these Rules in the aforesaid manner. This is clear from the department's own stand contained in the counter affidavit, and as noticed by the Tribunal also in the impugned order, namely, when the proposal was sent by the department to the UPSC, the department had very categorically stated in its letter forwarding the said proposal that selection of officers for promotion to the grade of senior administrative grade (Deputy Director General) was required to be made on merit which means those officers who were found to be `outstanding' were required to be placed above `very good'.

6. There is an important distinction between the phrases `selection' and `selection by merit'. When the selection is by merit, merit is to play a pre-determination role. In such a case a junior can steal a march over the senior if in comparative merit he is assessed superior than his senior. Thus, for example, in such a case if a junior is graded as `outstanding' as against a senior which is graded as 'very good ', junior would rank above senior in the merit list which is to be prepared after assessing candidates in the aforesaid manner.

7. Having regard to this nature of the Rule, the procedure which was laid down in the earlier OM of 10.3.1989 and 10.4.1989 etc. would be relevant. On the other hand if the promotion is by `selection' alone, then all those who are able to achieve the bench mark which is `very good' in the instant case, would be treated as fit for promotion and promotion to the post of next higher grade would be given on the basis of inter se seniority of those assessed `fit' for promotion. Such a difference has been explained by the Supreme Court in a catena of judgments and is now well a established principle. The Tribunal has referred to one such judgment in the case of ***B.V. Sivaiah & Ors. v. K. Addanki Baku & Ors.*** JT 1988(5) SC 96. Since in the present case, notwithstanding the unamended Rule 7(4) which was to be applied for the purposes of promotion, procedure laid down in OM dated 8.2.2002 could not have been applied which related to the cases where promotion is to be made by `selection', the Tribunal rightly held that the DPC did not follow the correct procedure and set aside selection process. On this issue, therefore, we are in complete agreement with the approach of the Tribunal and there is no reason to interfere with the same.

8. There is yet another issue which was dealt with by the Tribunal in its impugned judgment dated 15.9.2007, namely, clubbing up of vacancies. In para 10 of the judgment, vacancy position for each year was discussed and the Tribunal found no infirmity in the

exercise done by the DPC. Clubbing up of the vacancies, according to the Tribunal could not have been done. The directions, which were ultimately given in the impugned judgment are to the following effect:

> "26. In view of above discussion, O.A. is allowed with the following directions:
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> (a) Respondents shall hold review DPC for all the vacancies from the year 2000 till May, 2004 by following the criteria of selection by merit:
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> (b) Calculate the vacancies yearwise and consider only such of the officers who were eligible for those vacancies and fell within the zone of consideration;
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> (c) Prepare a panel yearwise;
>
> (d) To decide the seniority of such officers according to the new panel issue corrected seniority list of Dy.D.G. within a reasonable period:
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> (e) (i) It is, however, clarified that in case applicant/other officers become entitled to be promoted from an earlier date in view of recommendations to be made by review DPC, they would be entitled to only notional pay fixation from that date in view of 2006(5) SCC 673 **State of UP & Ors. Vs. Raj Kishore Yadav and Anr.**
>
> (ii) No recovery shall be made from those officers, who were already promoted but have to be adjusted in view of review DPC."

9. The review DPC was accordingly ordered to be held for vacancies till May, 2004 going by the consideration that amendment to the Rules was made in June, 2004. The period for which review DPC was directed was 2000 to May, 2004. As per direction (b), the petitioner was asked to calculate the vacancies yearwise and consider only such of the officers who are eligible for those vacancies and fell within the zone of consideration. Direction (c) was also to the same

effect, namely, preparation of yearwise panel.

10. The department, i.e., the petitioner herein, preferred a review application pointing out that the two vacancies which occurred in the year 2000-2001 had since been abolished and, therefore, directions to hold review DPC for that year should be modified. The petitioner also pointed out that in para 16 of the order where the Tribunal had mentioned that even for vacancies of 2001-2002 and 2002-2003 the DPC which met on 28.2.2002 has recommended the combined panel of five officers was not correct, inasmuch as, petitioners have never used the said word 'combined' anywhere in the reply and on this basis observations made that clubbing up of vacancies had taken place against the record, whereas, factually there was no such clubbing at all.

11. In this review application though no notice was issued, at the time of hearing counsel for the applicants (respondent No.1 herein) appeared and after hearing the department/petitioner and respondent No.1 herein the Tribunal disposed of the said RA vide orders dated 22.1.2007. Insofar as abolition of two posts which occurred during 2000-2001 is concerned, taking note thereof direction –(a) in its original order was amended and the Tribunal directed holding of review DPC for the vacancies starting from year 2001-2002 till May, 2004. In view of other submission, namely, the department had never clubbed the vacancies, the same was noted and direction

(b) contained in the original order was deleted. Amended directions that have been given in the order passed in RA read as under:

> "(a) Respondents shall hold Review DPC for all the vacancies starting from the year 2001-2002 till May, 2004 by the following the criteria of selection by merit;
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> (b) Prepare a panel year-wise and
>
> (c) to decide seniority of all such officers according to new panel and issue corrected seniority list of Dy. D.G. within a reasonable period;
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> (d)(i) It is, however, clarified that in case applicant/other officers become entitled to be promoted from an earlier date in view of recommendations to be made by review DPC, they would be entitled to only notional pay fixation from that date in view of 2006(5) SCC 673 State of UP and Ors. Vs. Raj Kishore Yadav and Anr.
>
> (ii) No recovery shall be made from those officers, who were already promoted but have to be adjusted in view of DPC."

12. We find that review was filed primarily for seeking correction of factual error which crept in the order and the revised directions which have now been given do not affect any of the respondents. Admittedly there was no DPC held for any vacancies for the year 2000-2001. DPC which was held was for one vacancy for the year 2001-2002 and four vacancies for the year 2002-2003 and the selection made on the basis of these DPCs was under challenge before the Tribunal. Though learned counsel for Respondent No.2 disputes that there was no abolition of vacancies in the year 2000-2001, that will not have any bearing in any case inasmuch as, as pointed out above, no DPC was even originally held for these

vacancies and was not the subject matter of challenge also in the original OA filed by respondent No.1. If there were vacancies for the year 2000-2001 and if they are not abolished, as contended by learned counsel for respondent No.2 he may have a separate remedy in this behalf.

13. Thus, though there may be some substance in the grievance of respondent No.2 that when the order in review was passed, he was not heard, we have heard learned counsel for respondent No.2 while examining the validity, or otherwise, of order passed in review application and are of the view that the said order does not prejudicially affect respondent No.2 in any manner than the impugned order passed in the OA.

14. We uphold the order passed in review application as well subject to aforesaid observations. The upshot of the aforesaid discussion would be to hold that present petition is devoid of any merit and is accordingly dismissed.

A.K. SIKRI, J.

VIPIN SANGHI, J.

September 20, 2007
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